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Civil society and investor-state dispute settlement: Assessing the social dimensions of investment disputes in Latin America

For submission to: New Political Economy

Written by: Julia Calvert, Career Development Fellow, Politics and International Relations, School of Social and Political Sciences, University of Edinburgh
Email. Julia.calvert@ed.ac.uk

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Abstract: Investor-state dispute settlement (ISDS) has come to the forefront of debate over corporate rights in the contemporary era. While proponents laud ISDS as a neutral and efficient means of dispute resolution, critics claim that it shields transnational corporations from the oversight of national legal systems while enhancing their ability to interfere in host state policy matters. Moreover, because dispute settlement is carried out in international tribunals, ISDS is argued to disable citizen-driven politics. Governments have called on arbitration bodies to enhance the transparency of ISDS procedures and open spaces for civil society involvement. This reflects a desire to increase the legitimacy of ISDS in the face of mounting contestation. In this paper, I examine the multiple ways in which civil society actors intervene in investor-state arbitration inside and outside of formal channels. I focus specifically on two disputes involving foreign investors active in the water and hydrocarbons sectors of Argentina and Ecuador respectively. I find that political pressure exerted by civil society actors influenced government decisions to break with investment rules and helped shape government positioning within arbitral processes. Civil society actors must therefore be recognised as important participants in investor-state disputes.

Keywords: bilateral investment treaties; social movement theory; global assemblage; Argentina; Ecuador; natural resources; global governance

Civil society groups have come to occupy a prominent position in the global politics of trade. The 1999 Battle of Seattle and successive demonstrations outside of multilateral trade forums signalled to the international community that citizen demands for inclusive trade policymaking would not be easily quelled. In recent years, investor-state dispute settlement (ISDS) involving legal claims brought by foreign investors against countries under investment treaties and chapters in free trade agreements has become the focal point of civil society concerns. Public skepticism of ISDS has been driven by the high number of claims levied against states and the powers of review international arbitrators exercise over government policies related to public health, natural resource governance and the environment. Indeed, multi-million dollar fines have been imposed against states found to have infringed on investment rules. Activists have strongly denounced the lack of transparency and accessibility in ISDS proceedings as well as the alleged corporate bias of international arbitrators.

Despite widespread recognition of the public interest implications of ISDS proceedings, civil society actors remain conspicuously absent from the growing literature on the politics of investor-state arbitration. Only recently have scholars begun to explore civil society participation in such proceedings. This effort, however, is largely confined to the limited number of cases in which northern civil society organizations (CSOs) open institutionalised spaces for engagement (Dumberry 2002; Mann 2002; Marley 2013-14; Puig 2013).¹ Such studies raise awareness of the multiplicity of actors involved in investment disputes. Yet important questions remain, for instance: how do civil society actors intervene in ISDS outside of institutionalised channels and what challenges face activists in the global South when seeking to intervene? A significant body of literature demonstrates how civil society actors have helped shape the global trade agenda inside and outside of formal channels (Hannah 2011; Trommer 2013; Spalding 2007; Von Bülow

2010). Shedding further light on civil society engagement in investment disputes within and outside of formal spaces will strengthen understandings of how such actors influence the enforcement of trade and investment agreements. This has important theoretical and practical implications for our understanding of the constraints and possibilities civil society actors face in the context of neoliberal globalization and will help expose the legal tools and resources available to activists in resisting the negative impacts of investor rights.

By civil society actors, I refer to both social movements and CSOs. Scholars tend to define the terms differently, however there is a consensus that at their most basic, such actors ‘consist of *organised contention* ...and that this contention is engaged in by those who are in some sense *excluded from “politics as usual”*’ (Arthur 2006: 1, original emphasis). Here, social movements are understood to encompass the ‘more nebulous, uncoordinated and cyclical forms of collective action, popular protest and networks that serve to link both organised and dispersed actors in processes of social mobilization.’ CSOs, on the other hand, refer to the more structured and institutionalised forms of collective action that stem from social movements (Mitlin and Bebbington 2006: 1). To be clear, I do not argue that civil society actors intervene in all ISDS cases. I assume that civil society intervention is more likely in cases where the rights and livelihoods of local communities and citizens are implicated.² The objective of this paper is restricted to examining how civil society activism influences the application of investment rules where these conditions exist. I focus my analysis on two ISDS cases involving foreign-owned companies active in the utility and hydrocarbons sectors of Argentina and Ecuador respectively. I chose these disputes because they involve companies whose operations had direct impacts on resident livelihoods and, as such, were highly politicised. Both countries also experienced a political shift at the national level during the height of the disputes with the election of left-

leaning governments. They therefore present the opportunity to theorise inductively the multiple ways civil society actors intervene and the obstructions that challenge such intervention before and after significant change in national political structures. Much of the analysis is informed by semi-structured interviews conducted in Ecuador and Argentina as well as an extensive analysis of legal documents pertaining to the cases.

I theorise ISDS as a global assemblage in which a heterogeneous assortment of actors, institutions and apparatuses interact in unstable ways to give force and effect to IIAs. Borrowing from actor network theory, I examine IIAs as textual objects that are animated through interactions between actors as they seek to advance (sometimes competing) interpretations of investment rules. Theorizing ISDS in this way lends recognition to the multiple ways in which civil society actors can shape the way investment rules are enforced against governments, for example, by targeting different actors and institutions or the inter-relationships between them.³ Yet the concept of assemblage tells us nothing about the strategies civil society actors adopt to contest investment rules and intervene in arbitral proceedings. As such, I take insights from social movement theory as a starting point to analyze activist strategies, namely the concepts of cultural framing, resource mobilization and opportunity structure. Both disputes began as localised conflicts between local operators and community activists. Activists employed strategic framing practices to mobilise opposition against the companies and elevated the dispute to the national-level. This, in turn, placed pressure on state officials to take action against the companies in conflict with their IIA obligations. The groups maintained political pressure throughout ISDS proceedings to ensure that political officials avoided settlements that would have kept the companies in the country. In these ways, activists aided the disputes' emergence and prolonged ISDS proceedings.

Yet the points of entry pursued by activists differed in some ways. In Ecuador, civil society actors targeted state actors as a means to influence the proceedings while challenging the normative foundations on which ISDS rests through an anti-ICSID discourse that linked the institution with neoliberal policy, which was heavily contested by various sectors of civil society. This provided a political foundation for Ecuador's withdrawal from the ICSID Convention under the Correa administration. In Argentina, activists sought formal entry in ISDS proceedings and carved out an unprecedented avenue for civil society participation via *amicus curiae*. However, this channel provided activists with little influence over how investment rules were applied by international arbitrators and required that activists adjust their strategy to meet the principles on which ICSID is founded. The different strategies reflect variations in activist ideologies and perceptions regarding existing political opportunities at the national and international level.

Both cases suggest that civil society intervention in investment disputes is possible from multiple entry points and that activists influence the emergence of investment disputes and government positioning during the arbitral process even if institutional spaces allow for only limited influence over the proceedings. Yet it is important to note the presence of unique political opportunities that enabled civil society groups to exert influence over the dispute. Most notable was the election of left-leaning political regimes, which created more conducive political opportunities for civil society activism. These opportunities may not be reproduced in countries governed by regimes that more strongly support investor rights.

ISDS and the global IIA assemblage

ISDS is a relatively new phenomenon in the evolution of international investment law. Historically, foreign investors relied on their home states to espouse a claim against their hosts in the event of a dispute. Home states, however, were not obliged to take up claims or to settle the dispute according to investor preferences, meaning that investors had little control over the outcome (Vandeveld 2005: 160). Movement towards ISDS began in the 1960s as the World Bank sought to carve out a role for itself in foreign investment promotion, resulting in the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) in 1965. ICSID was sold to countries as an apolitical project that would enable governments to offload responsibility over investment disputes and avoid the diplomatic tensions that resulted from state-state dispute resolution (Pauwelyn 2005). ICSID's institutional skeleton was drafted by legal staff and came to reflect, as Pauwelyn (2005: 27) observes, their preference for commercial style arbitration: arbitrators are appointed by the disputing parties, which are defined as being the state and foreign investor; arbitral awards are not subject to appeal and stress financial compensation over soliciting compliance; and, proceedings were to be strictly confidential. Arbitration rules developed by the United Nations Commission on International Trade Law (UNCITRAL) in 1976 embraced this model (Franchini 1994: 2226). Dual and sometimes competing logics of private commercial law and public international law therefore came to be embedded in the arbitral system.

Yet ISDS was not a common feature of international investment agreements (IIAs) until the early 1990s, which meant that ICSID and UNCITRAL rules were rarely used. Foreign investors pushed for the inclusion of ISDS mechanisms in IIAs as it provided greater control over dispute outcomes and avoided the cumbersome process of state espousal (Subedi 2012: 19-21). The increasing internationalization of production and the diffusion of neoliberal preferences

for economic liberalization and privatization since the 1980s created a more receptive political environment for such demands and drove a renewed effort by capital-exporting states, particularly the United States, to secure investment protections. Repeated attempts to negotiate a multilateral framework for investment protection failed, prompting a turn towards bilateral investment treaties (BITs) (Miles 2013: 85; Kurtz 2002). 1,857 BITs were signed by 1999, a leap from the 102 BITs signed at the end of the 1980s (UNCTAD 2000: 3). This new generation of IIAs contained more stringent standards on investment protection and liberalization than earlier agreements and reflected a growing consensus on ISDS (Subedi 2012: 96). For civil society groups, which were excluded from recognition by arbitral rules, the shift towards ISDS represented an attempt to insulate the exercise of investor rights from public scrutiny (Puig 2013).

Proponents laud ISDS as a neutral and efficient means of dispute resolution (see Movesesian 2008). Critics, however, claim that it shields transnational corporations from the oversight of domestic legal systems while enhancing their ability to interfere in host state policy matters. By the end of 2015, 696 claims were brought to arbitration by foreign investors against over 100 governments, 36 per cent of which have been decided in favour of the state and 27 per cent in favour of the investor. 34 per cent of cases were settled or discontinued (UNCTAD 2016: 105). This suggests that foreign investors are not always successful in their legal claims. Public opposition over ISDS, however, has been driven by the highly publicized instances in which tribunal members exercise their powers of review over state regulatory schemes related to public health, natural resource governance and basic service provision. Governments and international organizations have called on arbitral bodies to enhance the transparency of ISDS procedures and open spaces for civil society involvement. This reflects a desire to increase the legitimacy of

ISDS in the face of mounting contestation and the recognition that civil society participation can strengthen the democratic quality of global governance institutions, for instance, by enhancing information-sharing, strengthening accountability mechanisms and giving representation to public interests that might otherwise be excluded (Krut 1997; Mercurio and Laforgia 2005; Scholte 2011; Castells 2008). Some institutions responded to these calls. For example, in 2003, the Free Trade Commission for the North American Free Trade Agreement granted formal recognition to the right of third parties, namely CSOs, to submit written statements in the form of *amicus curiae*. ICSID followed suit in 2006 with its revised arbitration rules.⁴ This suggests that civil society contestation is beginning to influence the evolution of ISDS procedures. Yet some critics question whether institutional channels provide for meaningful public engagement (Puig 2013).

The similarities found across contemporary IIAs in terms of their structure, purpose and principles have encouraged scholars to conceptualise the agreements as constituting an international legal regime (Haslam 2010; Cho and Dubash 2005; Cutler 2013; Salacuse 2010; Milner 2014). This ‘regime’ is understood in the sense of international relations theory as a system of governance composed of principles, norms, rules and decision-making procedures that constrain and regularise state behaviour (Salacuse 2010: 431). States are not absent of agency under international regimes as regimes are not deterministic. ISDS, however, provides a particularly strong incentive for states to adhere to investment rules given the threat of costly and protracted legal battles and multi-million dollar fines. IIAs, critics argue, therefore reduce host state policy autonomy as state officials fear that introducing new regulations will conflict with IIA obligations or because they internalise the norms on which the agreements are based and

censor their own policies (Blackwood and McBride 2006; Chang 2006; Cho and Dubash 2005; Haslam 2007; Spears 2010; Tienhaara 2006; Yazbek 2010).

Moreover, because disputes are resolved outside of domestic legal systems, ISDS is argued to disable citizen-driven politics (Schneiderman 2008). Claire Cutler (2013: 17), for instance, asserts that

[Investment agreements] set limits to state action in a number of areas of vital public concern, including the protection of human and labour rights, the environment, and sustainable development. They determine the distribution of power between foreign investors and host states and their societies. However, the societies in which they operate seldom have any input into the terms or operation of these agreements.

Cutler notes the participation of CSOs via *amicus curiae* submissions in ISDS cases, yet their inability to influence arbitrators' judgements leads her to conclude that citizens have no role in shaping arbitral proceedings.

While the regime perspective rightly acknowledges the power asymmetries that inform and are reproduced by investment treaties, it has led to a concomitant tendency to exaggerate the cohesiveness of investment agreements and the consistency with which investment rules are enforced amongst critical scholars. This is while the mechanisms through which the principles and norms underpinning IIAs are translated and given force are left under explored and under theorised. On their own, IIAs are no more than texts or what actor network theorists call 'non-human actants' (Latour 2005). Non-human actants possess no inherent agency, but act and shape action as they engage with human (and non-human) actants. It is through this engagement that the specific rules and provisions contained in IIAs become translated into state obligations. Yet

IAs are not intrusive objects that demand engagement as directly as a roadblock does when encountered by automobile drivers. IAs are more abstract in nature and occupy the less concrete domain of the global. The capacity of IAs to act therefore depends on their ability to enroll a more complex and geographically dispersed network of actors with whom they can engage. This includes, for instance, administrative apparatuses (for example, that of ICSID), international treaties (the New York Convention), foreign investors, state actors and the veritable cottage industry of legal representatives, arbitrators and expert witnesses that benefit professionally and financially from ISDS cases (Olivet and Eberhardt 2012; Van Harten 2008). Also included are the civil society actors who engage with investor treaty rights and arbitral processes inside and outside of formal spaces.

Another way to conceptualise this network is to use the metaphor of assemblage. A global assemblage refers to a heterogeneous and geographically dispersed assortment of components that occupy national and sub-national spaces. These components interact in unstable and inconsistent ways, the effects of which can be compromising or empowering for the whole or specific parts. They are united, however, by a specific problematization of social relations to which a solution of control or management is proposed (Ong and Collier 2005; Rabinow 2003). Put another way, IAs and their networks of power depend on a socially constructed problematization of investor-state relations. This problematization informs and is reproduced by the ideas and discourses that render IAs and ISDS as necessary legal interventions. Most notably, this includes the economic philosophy, development discourses and technical-legal expertise that identify IAs as a necessary means to secure the ‘friendly’ investment markets necessary for economic progress. These ideational factors enable IAs to forge the networks essential to their capacity to act.

Conceptualizing IIAs as components of a global assemblage allows us to recognise the ‘contingent, uneasy, unstable interrelationships’ amongst the multiplicity of actors, administrative apparatuses and expertise involved in the enforcement of investment rules (Ong and Collier 2005: 12). This has several advantages. First, it necessitates that we interrogate the messy and contentious micro-processes through which investment rules are translated into specific state obligations. The ambiguous wording of investment provisions, which encourages opposing parties to compete over their interpretation and the ad hoc nature of arbitral tribunals whose members are not held strictly to jurisprudence, means that investment rules are sometimes applied differently across cases.⁵ Second, it requires that we examine how cooperation between actors (sometimes operating at different levels) lends agency to investment rules and the limitations of this cooperation. It was commonly assumed that a state would voluntarily oblige by arbitral rulings given the risk of capital flight and damage to its international reputation. In the era of rising ISDS claims, however, such cooperation is not guaranteed. Investors’ home states play an important role in enforcing arbitral rulings in the face of a resistant host state. Yet the willingness of home states to introduce sanctions against a host may be limited by other foreign policy interests.⁶ From the perspective of assemblage, the power IIAs exert is not distinguishable from the agency of states and other network participants but is shaped and constituted by it.

Lastly, the perspective of ‘assemblage’ acknowledges the possibility that civil society actors interact with investment rules in diverse and intimate ways and places. By acknowledging the diversity of actors and institutions engaged in enforcing investment rules and the unstable nature of their interactions, the researcher is compelled to examine how civil society actors target different assemblage participants in ways that alter how investment rules are applied. For instance, civil society actors may adopt strategies aimed at convincing state officials to take

action against a foreign investor, which can alter the state's interactions with the investor, its home-state and IIAs. Activists may also seek to influence arbitrators' engagement with investment rules by advancing particular interpretations of key provisions via *amicus curiae* statements.

It is important to note that states, civil society actors and foreign investors are also amalgams of diverse actors and institutions and, as such, are assemblages in their own right. Their interrelationships are therefore diverse and unstable. Of particular relevance is the state, which is composed of disparate parts that may adhere to competing interests and logics and, as such, may not respond to the same stimulus in the same way (Migdal 2001). Different parts of the state, moreover, are targeted in different ways by different actors. Civil society actors, for instance, can target politicians for decisions on policy and regulation vis-à-vis foreign investors and / or officials in the Attorney General Office to influence state responses to investor legal claims, yet there is no guarantee that politicians and state legal representatives will respond. Moreover, recognising competing logics within the state may help explain why governments take a seemingly contradictory approach towards investor claims. For instance, the Kirchner administrations in Argentina contested the authority of ICSID and investor rights without terminating the ICSID Convention or IIAs as Ecuador has done.

Yet theorizing ISDS in this way tells us nothing about how civil society actors insert themselves into or shape arbitral proceedings. Social movement theorists provide more insight into the strategies activists employ to influence political processes. Three concepts have become central to social movement theory: resource mobilization, cultural framing and political opportunities. The concept of resource mobilization turns our attention to the use of financial, human and technological assets in activist strategies. Studies of resource mobilization examine

where resources are available, how they are used and the impact of these factors on desired outcomes (Mueller 1992: 3). The concept of framing refers to the creation of ideas and meanings and how they are wielded to assign blame, advance interpretations of causation, and advocate change (Snow and Bedford 1992: 136). It is used in recognition of the ideational dimensions of social activism to draw out the significance of persuasion and argumentation in social movement strategies.

Political opportunities refer to the environmental factors that influence the degree to which political processes are open to contestation. The assumption is that civil society actors operate within international and domestic contexts of opportunities and constraints and that shifts in actors' political environments lead to corresponding changes in activist strategies (Sikkink 2005: 154). The concept is most often applied in state-level analyses to explain cross-national variation in social movement strategies (Wilson and Cordero 2006: 326). However, as studies on transnational social activism acknowledge, activists that target global institutions and processes interact with political opportunities above the state (Della Porta and Tarrow 2005; Keck and Sikkink 1998; Reitan 2007). Jackie Smith et al. (1997) uses the term 'international political opportunity' to recognise the channels created by shifts in the world polity, for example, when existing international institutions modify rules to enhance civil society participation in decision-making processes.

It is important to note that political opportunities and constraints are not objective factors, but are largely perceived (McAdam, Tarrow and Tilly 2001). Sikkink (2005: 164) asserts that activists engaged in contesting international institutions typically compare opportunities and constraints at the international and domestic levels. Where activists operate in domestic environments they perceive as more open than international institutions, activists, often working

within transnational networks, are most likely to use domestic protest and political pressure activities to try to block particular international commitments or open up international organizations. Where activists see both domestic and international institutions as open, they are likely to privilege domestic political change but will pursue activism within international institutions as a complementary option.

However, it is important to note that changes in political opportunities can be perceived differently. Rose Spalding (2007), for example, found civil society groups divided in response to the creation of participatory mechanisms meant to enhance civil society participation in the United States - Central America Free Trade Agreement negotiations. While some activists viewed the invitation to participate as a valuable achievement and a critical opportunity to influence negotiation outcomes, others denounced the participatory mechanisms as an attempt to co-opt the opposition movement and grant legitimacy to undemocratic proceedings. This variation in the perception of political opportunities she attributes to activist ideologies and organizational differences. Indeed, that some civil society actors view international institutions as part of the *solution* while others view such institutions as the *problem* is a paradox of social movement activism and scholarship (Sikkink 2005: 156). In the next section, I employ the concepts of framing, resource mobilization and political opportunity to explore some examples of how civil society groups intervene in ISDS proceedings in two distinct settings: Argentina and Ecuador.

Big Oil and the Anti-Occidental Movement in Ecuador

In 2012, an ICSID tribunal ruled that Ecuador breached the United States-Ecuador BIT by expropriating the assets of a US-based oil company, Occidental Exploration. The tribunal awarded Occidental over USD\$ 1.77 billion, although this was reduced to \$1.016 billion following an annulment proceeding. On the surface, the dispute appears to stem from Occidental's unauthorised sale of a stake in its concession area to Alberta Energy Company (AEC). The sale violated the company's contractual commitments and Ecuador's Hydrocarbons Law and therefore, government officials claimed, necessitated the contract's termination. Occidental alleged this was a disproportionate response motivated by political interests rather than concern over the legality of the concession sale. Indeed, the dispute gained momentum in the midst of rising protests against neoliberal reforms fed by the resurgence of indigenous organising in 1990. Among the most controversial of reforms was the liberalisation of Ecuador's oil sector. The withdrawal of oil wealth by foreign multinationals and resulting environmental damage was seen by activists as emblematic of the injustices undergirding neoliberal policy. Anti-neoliberal activists were responsible, in part, for the removal from office of both the Jamil Mahaud (1998-2000) and Lucio Gutiérrez (2003 – 2005) administrations in the early 2000s. Therefore, when mounting conflicts with indigenous and environmental groups brought Occidental to the centre of anti-neoliberal protests in the mid-2000s, government officials were forced to take action. Examining the political context in which the dispute arose is therefore central to understanding the dispute's emergence and ultimately its final outcomes.

Occidental entered Ecuador in 1985 after securing a service contract with the State Petroleum Company of Ecuador (SPCE – later renamed Petroecuador) to exploit Block 15 located in the Amazonian provinces of Orellana and Sucumbíos. Its operations expanded quickly and by the early 1990s, it operated 22 production wells located on six drilling platforms. Tensions between

the company's operators and local communities grew as Occidental's activities expanded. Block 15 had for a long time been inhabited by Quechuan communities of Rio Jibino, Limoncocha, Itaya and Pompeya. Community members protested the company's incursion onto hunting and farming lands and the mounting damage being done to crops and waterways. Tensions became more acute when Occidental began decreasing its promised assistance and employment opportunities for local communities (Kimerling 2001).

Occidental's expansion was aided by the liberalization of Ecuador's oil sector. The administration of President Sixto Durán Ballén (1992-1996) instituted a generous system of tax incentives and reduced state oversight over the oil sector by restructuring Petroecuador, modifying the system of oil contracts, opening downstream activities to private investment and expanding the Trans-Ecuadorian Oil Pipe System (Perreault and Valdivia 2010: 693). Oil sector privatization was part of Durán's neoliberal reform effort, which built on the austerity measures adopted by previous administrations. Other state owned enterprises were privatised and traditional protections and subsidies given to domestic firms eliminated. Durán signed on to 16 BITs and reformed the country's system of land ownership to attract foreign investment, which strained government relations with indigenous groups as oil companies expanded onto lands occupied by indigenous communities (Hey and Klak 1999; Thoumi and Grindle 1992).

Neoliberal reforms were heavily contested by Ecuador's burgeoning civil society. In 1995, indigenous groups mounted a national campaign aimed at blocking the passage of neoliberal policies. Public sector workers, urban activists, women's organisations, human rights activists and environmentalists joined the movement to defeat a referendum on the reforms (Collins 2014: 73). Oil sector privatization was particularly contested because of the dominant role played by the state in oil production since the 1970s. Oil revenues financed the extension of import-substitution

industrialisation policies throughout the 1970s and contributed to a public perception of economic progress and modernization. Oil production was therefore embedded, as Perreault and Valdivia (2010: 692) observe, in the national imaginaries of Ecuadorians as a vital aspect of the state's nation-building project. The entry of multinational oil companies was therefore perceived to be equivalent to the surrender of national interests to private foreigner actors. By economic standards, the privatization process was a success. Foreign investment in oil exploration and exploitation increased from US\$ 90 million in 1991 to US\$ 1,120 million in 2001. Known reserves increased markedly, from 2,115 billion barrels in the mid-1990s to 4,630 billion by 2004 (Stanley 2008: 5 – 7).

The political context in which Occidental expanded its operations was therefore highly charged. In 1999, the company secured a more generous contract and in 2000 was given the rights with a consortium of investors to construct an oil pipeline from the Amazonian basin to the Esmeraldas refinery. By 2000, it had become the largest private oil company operating in Ecuador. Then-president Gustavo Noboa Bejarano (2000-2003) championed the pipeline as an important source of revenue for the country. Yet protests by environmental groups and landowners disrupted progress towards its completion (Hedgecoe 2002). In August 2003, demonstrators attempted to take over an oil station operated by Occidental in Sucumbíos but were prevented by 300 military officers and armed police. Instead, demonstrators protested before the facility in reclamation of the minimal compensation given to indigenous families for expropriated land and the environmental damage caused to forests and public water sources. Protests ended after demonstrators agreed to bring their concerns to anti-neoliberal protests planned for the following days (El Comercio 2003). The environmental destruction and land expropriation caused by the pipeline's construction was framed by protestors as a symptom of

corporate greed rather than economic progress, a message that resonated with the anti-neoliberal movement (PRNewswire 2002).

In 2002, Occidental introduced a treaty claim against Ecuador in the London Court of International Arbitration under UNCITRAL rules. The claim was a response to an announcement made by Ecuador's Internal Revenue Service (IRS) that oil companies would no longer receive reimbursements for value-added tax paid on goods and services used in the production of oil for export. Occidental alleged that the withdrawal of tax credits was a violation of the United States-Ecuador BIT. The dispute received widespread attention from civil society groups and fed growing anti-US sentiment. In 2004, the UNCITRAL tribunal ruled in Occidental's favour, awarding the company USD\$ 75 million. Ecuadorian attorneys challenged Occidental's win in annulment proceedings, albeit unsuccessfully. The Attorney General then initiated a review of the company's practices to ensure it had complied with its own contractual obligations. Upon conclusion of the audit, the Attorney General announced in a public radio address that Occidental had breached the contract by selling a 40 per cent stake in its concession to AEC without proper ministerial authorization.⁷ He then wrote to the Minister of Energy and Mines, Eduardo López and the President of Petroecuador requesting the termination of Occidental's contract.

The audit findings fuelled public outrage and established a basis under Ecuadorian law on which the government could terminate Occidental's contract. This, in turn, provided expanded political opportunities for the expression of anti-Occidental messaging. Concerned indigenous and environmental groups framed Occidental's UNCITRAL win and continued operations in the country as endemic of broader injustices underwriting neoliberal policy, oil privatization and Ecuador's relations with the United States. This frame appealed to a large cross-section of

activists. In the early months of 2005, demonstrators congregated in the streets of Quito and in front of Occidental offices to demand the cancellation of Occidental's contract and an end to free trade negotiations with the United States.⁸ Protestors included members of workers' unions, indigenous campesinos and middle class activists. The anti-Occidental movement, which was previously confined largely to the Amazonian basin, found a place on the national stage. This enabled the movement to capture the attention of left-leaning legislators who opened up greater political opportunities by helping push forward efforts to expel the company.

In February 2005, Minister López and Petroecuador executives were called before the National Congress to explain why the termination had experienced delays. In April 2005 after days of violent protests, congress members ousted President Gutiérrez and replaced him with his Vice President, Alfredo Palacio (2005 – 2006). During a major strike the following June, several government officials including the new Minister of Energy and Mines, Iván Rodríguez, signed a resolution directed towards the provinces of Orellana and Sucumbíos where protests were most violent, stating:

The Minister of Energy and Mines and the President of Petroecuador...commit to undertaking all of the necessary steps for the departure from Ecuador of the companies Occidental and EnCana AEC for having violated the juridical norms of the country.⁹

Yet no immediate action was taken and protests persisted. Frustrated with government inaction, attacks on installations and occupations by community groups in the provinces of Sucumbíos and Orellana in August 2005 cut private oil production in the area by half. Protestors called for higher wages, more jobs for local people and the construction of infrastructure such as schools, roads and health clinics. President Palacio responded by sending troops to occupy the provinces

under a state of emergency (Weitzman 2006). This exacerbated the conflict and led to increased demands for the outright nationalisation of the oil sector. It is important to note that protestors did not object to oil exploitation, but sought a larger share in the benefits and the adoption of more sustainable environmental practices. Such demands, protestors believed, were unlikely to be met by a private multinational.

In November, 27 members of congress called for the impeachment of Minister Rodríguez if he failed to conclude the termination process. Protestors also convened a general strike, effectively paralyzing transportation networks in the north and center of the country. The strike's leaders offered, 'if caducity (termination) of the Occidental contract is declared, we will lift the strike'.¹⁰ Occidental's continued operation in the country was seen as flying in the face of the country's laws and as reflective of the failure of government officials to discipline corporate interests. The Confederación de las Nacionalidades Indígenas del Ecuador (Confederation of Indigenous Nationalities of Ecuador, CONAIE), a leading voice in anti-Occidental protests, issued a statement, which read:

[Occidental] has violated the law and misled the Ecuadorian state...we are tired of the fact that the rich and powerful in this country do not comply with law and can cheat and steal with impunity. We agree with the order given by the State Attorney and Petroecuador and demand the immediate termination of Occidental's contract and its immediate expulsion (AmazonWatch 2006, author's translation).

During the lead up to the presidential elections in May 2006, then-presidential candidate Rafael Correa led demonstrations outside of Occidental offices calling for the company's closure. The same day, various CSOs demanded the impeachment of President Palacio for

considering a settlement with the company. On 15 May 2006, the Minister issued a decree, formally terminating Occidental's contract and ordering the company to turn over its assets to Petroecuador.¹¹ Petroecuador employees took over Occidental offices while the army was sent to guard the facilities. Occidental introduced its ICSID claim the next day and accused the government of terminating its contract without legitimate cause. The termination, they argued, was motivated by a desire for revenge after Occidental's win in the VAT dispute and to appease the demands of organised pressure groups. The termination proceedings, the company argued, were therefore unfair, arbitrary, discriminatory and disproportionate in violation of the BIT.¹²

The termination of Occidental's contract was in part a direct response to civil society demands made under the threat of political reprisal. However, there are no provisions in the United States-Ecuador BIT that oblige or enable arbitrators to weigh citizen demands against investor rights. Arbitrators therefore interpret investment rules in isolation from the dispute's political context unless, as in this case, political demands are referenced as evidence to support claimants' assertion of discriminatory treatment. In response, state lawyers for Ecuador claimed that the termination was made necessary by Occidental's own actions after it sold the stake in its concession area in violation of its contractual commitments and the Hydrocarbons Law. Activist concerns related to the company's operations did not prevail within the arbitral proceedings. In their final ruling, the arbitrators found that Ecuador had acted in accordance with its rights under the concession contract, but had acted disproportionately in expropriating the company's assets.

Yet not all arbitrators translate investment rules in the same way. In her dissenting opinion, arbitrator Bridgette Stern denounced the US\$1.77 billion award against Ecuador rendered by her colleagues, asserting that,

The consequence of the fault committed by [Occidental], when they violated the Ecuadorian law, is overly underestimated and insufficiently taking into account the importance that each and every State assigns to the respect of its legal order by foreign companies.¹³

The damages, she concluded, should be reduced according to the proportion of the concession area sold off by Occidental. An annulment tribunal agreed and reduced the award by 40 per cent.

The anti-Occidental movement began as localised movement confined to the Amazonian provinces most affected by Occidental's operations. Yet by tying the repercussions of Occidental activities to issues of corporate greed, indigenous and environmental activists exploited public dissatisfaction with neoliberal reforms. This served to unite broad swaths of civil society in contentious protests against the company. These large-scale mobilizations were central to the movement's ability to prompt state action against Occidental as they captured the sympathy of nationalist legislators who provided a more direct channel for protestor demands to shape political decision-making. The timing of the 2006 presidential elections further expanded political opportunities as Correa took up protestor demands, largely as a means to shore up his own political popularity. Yet activists did not seek formal participation in the legal proceedings as they viewed IIAs and arbitral bodies as fundamentally biased towards corporate interests and as reproducing power asymmetries between US corporations and Ecuadorian citizens. Rather, activists kept a watchful eye on the proceedings and maintained pressure on state officials to avoid a settlement that would keep Occidental in the country. This drastically reduced the kinds of concessions Ecuadorian officials could offer Occidental to stave off a potentially negative ruling. In this way, activists exerted influence over the ISDS proceedings and ultimately its final outcome.

Occidental's BIT claims were accompanied by several others brought by foreign oil companies, including the now infamous claim by Chevron introduced in response to its loss in a class action lawsuit brought by residents of the Amazonian rainforest. These disputes generated widespread social opposition against ICSID and BITs. Correa's election in 2006 signalled an important political shift in Ecuador and in the country's relationship to the global IIA assemblage. Correa campaigned on promises to institute a 'Citizen's Revolution' and '21st Century Socialism', which earned him populist appeal and a majority government (Conaghan 2008). Correa leveraged public opposition to ICSID to reduce the country's linkages with the IIA assemblage and create greater space for the advancement of his political agenda, notably by terminating BITs with El Salvador, Cuba, Guatemala, Honduras, Nicaragua, the Dominican Republic, Paraguay, Uruguay and Romania. In 2008, Correa also denounced the ICSID Convention as a violation of Ecuador's Constitution. Article 422 of the Constitution, passed in 2008 via public referendum, forbids the government from ceding jurisdiction to international arbitration entities outside of Latin America. The article is a manifestation of widespread dissatisfaction with arbitral rulings in the highly publicised battles with oil companies like Occidental (Gomez 2012). However, Ecuador has not terminated its BIT with the United States. This decision reflects the way in which investor-state relations have been problematised in development discourses. Officials believe the BIT is a necessary legal intervention that helps attract and retain foreign capital despite the risk of future investor claims.¹⁴ While Correa's election provided greater political opportunity for the expression of social opposition to investor rights, Correa has been selective in Ecuador's withdrawal from the global IIA assemblage and has protected foreign investment attraction as a policy priority.

Water Politics in Buenos Aires, Argentina: Between Investor Rights and Human Rights

Argentina has faced the greatest number of investor-state disputes out of any country in the world (UNCTAD 2015). The majority of disputes stem from the emergency measures introduced by the government to placate the symptoms of a severe economic crisis that hit the country in 2001. The crisis caused widespread political and economic instability as poverty rates doubled and mass protests erupted in demand of state action. The emergency measures, introduced in January 2002, placed a freeze on utility rates and eliminated the right of utilities owners to calculate tariffs in US dollars while tariffs were converted to a fixed peso rate. The Currency Convertibility Plan, which pegged the Argentine peso to the US dollar was also terminated, causing the peso to devalue by almost 70 per cent. The terms of investors' original contracts proved no longer viable due to the severe strain placed on users' budgets whose incomes had significantly devalued. Since their debts were nominated in US dollars, many foreign investors operating in the utilities sector faced severe financial losses (Vicien-Milburn and Andreeva 2010: 295). Over 40 treaty claims were brought against Argentina by foreign investors whose contracts were negatively impacted.

Among the most controversial of cases was a joint claim brought by Suez and Vivendi Universal, based in France, Spain-based Sociedad General de Aguas de Barcelona and the AWG Group based in the United Kingdom. Together, the investors owned and operated Aguas Argentina S. A. (AASA), a company established for the purposes of operating water and wastewater services in the province of Buenos Aires and 17 surrounding municipalities, an area previously serviced by the state-owned company Obras Sanitarias de la Nación (National Sanitation Works, OSN). The investors alleged that the emergency measures amounted to an illegal expropriation of their investments and a denial of their treaty rights to full protection and

security and fair and equitable treatment. Argentine state lawyers, however, asserted that the measures were necessary to ensure citizens reliable and affordable access to water in line with the state's human rights obligations.

The sale to private investors of the concession area was part of a larger privatization process initiated by the government of Carlos Menem (1989 – 1998) as a solution to the hyper-inflationary crisis experienced by the country during the late 1980s. Menem aimed to attract foreign investment into the utilities sector to reduce state spending and improve services that had considerably deteriorated. Menem therefore introduced policies aimed at liberalizing Argentina's investment market, notably the Currency Convertibility Plan in March 1991, and signed on to 55 BITs. The Convertibility Plan was instituted as a means to combat Argentina's historic volatility to high inflation and give confidence to foreign investors (Haselip and Potter 2010: 1168). This scheme was eventually reflected in the concession contract of AASA as rates were fixed in US dollars.

To generate support for water privatization, officials promised residents that water and sewer access would be expanded in communities without access and that tariff rates would be reduced for those connected. The OSN had largely failed to expand service delivery in suburban communities, particularly in the poorest areas, leaving many without access. Water shortages plagued the city in the summer and most sewage was discharged without treatment, polluting local rivers and groundwater sources and enabling the spread of disease. These issues resulted largely from deteriorating infrastructure and OSN's ineffective tariff collection practices. Leading up to the privatization, the government increased water tariffs and included a new infrastructure fee in the bills of newly connected customers to make the concession area more attractive to foreign investors. After winning the concession contract, AASA introduced a 26 per

cent reduction on water tariffs as a means of generating support amongst community members. The concession contract also set out ambitious targets for service upgrades and expansion. Over the 30-year contract, the company was to attain universal water coverage for the concession area and increase access to sanitation services to 90 per cent and the treatment of wastewater to 93 per cent (Schiffler 2015: 32).

During the first months of the company's operations, the number of households connected to the water and sewer network increased and customer service improved.¹⁵ Soon after, however, the company pressed for a series of tariff increases in exchange for a commitment to accelerate some investments, including the construction of a wastewater treatment plant. In 1994, the company increased tariffs by 13.5 per cent while water and wastewater infrastructure connection fees increased by 36 and 48 per cent respectively. In 1997, the company again renegotiated tariff increases while the government waved fines levied against the company for its failure to reinvest earnings into infrastructure upgrades (Schiffler 2015: 41). Estimates suggest that the average water bill grew by almost 90 per cent during the company's first decade of operation while commitments to upgrade and expand service delivery went unmet. In many neighbourhoods, households were forced to continue dumping sewage into rivers, makeshift septic tanks or directly onto the street, which exacerbated environmental and public health problems. This is while the company made record profits year after year (Vilas 2016). Consumer advocacy groups sprung up across the concession area to protest increases to water bills. Activists steeped their opposition in a human rights discourse: by allowing the company to increase water bills, the government made it impossible for residents to access affordable water in violation of the human right to water guaranteed under international law.

Many consumers refused to pay the infrastructure connection fees and in 1996, street protests erupted in several suburban communities against attempts to collect it (Schiffler 2015: 40).

Towards the end of the 1990s, a series of external shocks led to the rapid deterioration of economic conditions in Argentina. Output plummeted and GDP fell, peaking in 2002 at a 10 per cent contraction (Wylde 2011: 437). Food riots broke out in Buenos Aires, to which the government responded with violent repression led by police forces. Street protests then exploded in most major cities to demand the resignation of Menem's successor, Fernando de la Rúa. In December 2001, de la Rúa stepped down and Argentina cycled through five presidents in under three weeks until an interim government led by Eduardo Duhalde was established (Wylde 2011: 438). It was under Duhalde that Congress instituted the emergency measures (Law 25.562). It was clear that the measures would negatively impact foreign investors, particularly in the utilities sector. Duhalde therefore offered investors two options: renegotiate tariffs or continue with the tariff system denominated in pesos (Stanley 2006: 7).

AASA demanded that the Central Bank provide US dollars at the one-to-one exchange rate, but the government refused. The company then requested a 42 per cent tariff increase, but the government rejected the request as it meant increasing the water bills of increasingly impoverished citizens. This drove the company to freeze its investments and default on its loans, which had grown to almost US\$700 million despite the company's profitmaking (Schiffler 2015: 41). AASA introduced its ICSID claim in 2003, demanding USD\$ 1,019.2 million in compensation. Argentina challenged the legitimacy of ICSID's jurisdiction, claiming that the dispute was a contractual matter better left to the authority of its own domestic legal system. Over the next four years, AASA serviced the concession area while attempting to renegotiate the terms of its contract with government officials. Consumer advocacy groups paid close attention

to the negotiations and demanded a hardline approach. Many activists called for the outright renationalization of the concession area. While public opposition to the company buttressed the government's bargaining power, it also meant that officials were constrained in the concessions they could offer in order to arrive at a settlement (Post and Murillo 2013). Without a settlement, AASA was unlikely to drop its ICSID claim.

In 2006, after renegotiations again failed, the government of Néstor Kirchner terminated the concession contract and renationalised the company's assets. The same year, the ICSID tribunal confirmed its jurisdiction over the dispute and arbitral proceedings began. Kirchner was elected in 2003 as the leader of the Frente para la Victoria, a faction of the Peronist party traditionally associated with populism and state intervention. He sought to revise the terms on which contracts with foreign investors were negotiated by providing consumer groups a formal presence in the unit constituted to lead the renegotiations. This opened up significant political opportunities for the expression of civil society concerns related to AASA operations. Like Correa, Kirchner promised to reverse neoliberal orthodoxy. He also sought to reaffirm the government's commitment to human rights by repealing the amnesty granted by previous administrations to those involved in the Dirty War. However, Kirchner's brand of leftist politics placed less emphasis than Correa on reforming perceived exploitative trade and investment relations with the West. Kirchner focused instead on strengthening the country's position in the global political economy through selective state intervention, namely through industrial and macroeconomic policy. The subtle but significant differences between Kirchner and Correa in ideology and developmental strategies reflect variations in the sociopolitical and economic contexts of Ecuador and Argentina, particularly the progressive forces that saw the regimes to power.¹⁶

During the proceedings, Argentina's State Attorney General defended the emergency measures as a necessary means to address the crisis conditions and were therefore justifiable under the necessity defence. The necessity defence refers to the use of specific provisions found in most BITs and under international law that exempt government action taken in times of crisis from full treaty coverage.. AASA, state lawyers argued, must bear part of the adjustment burden as citizens and domestic businesses had done. Consumer groups and human rights groups protested the lack of transparency in the proceedings and sought to open opportunities for participation. A coalition of domestic CSOs, including consumer groups and think-tanks with expertise in international law, joined forces with a Washington-based think tank to petition the ICSID tribunal for access.¹⁷ Although some activists feared participating in the arbitration would legitimate a process fundamentally biased towards corporate interests, others perceived the need to give voice to citizen concerns.¹⁸ For the more institutionalised CSOs, such as the Centre for International Environmental Law (CIEL) based in Washington and the Asociación Civil por la Igualdad y la Justicia (Civil Association for Equality and Justice), opening up opportunities for civil society input presented a means to advance their broader goal of creating more democratic and participatory decision-making structures at the international level. CIEL, moreover, does not object to international investment rules in principle but instead aims to enhance civil society capacity to shape investment rules so that they may better promote sustainable development.

The coalition allowed activists to mobilise complementary resources. While consumer groups possessed an intimate knowledge of the company's operations and its impacts on local communities, the larger CSOs were equipped with the expertise needed to draft legal petitions. In January 2005, the coalition submitted a joint 'Petition for Transparency and Participation as Amicus Curiae' with the Secretary of the Tribunal, in which the coalition requested formal

access to the hearings, the opportunity to present legal arguments in the form of amicus curiae and unrestricted access to court documents. The coalition argued that the case involved matters related to the fundamental rights of people living in the concession area, which were best represented by the people themselves.¹⁹

ICSID Arbitration Rule 32 (2) regulates the participation of persons in ICSID hearings. It states that, ‘Unless either party objects, the Tribunal...may allow other persons besides the parties...to attend or observe all or part of the hearings.’ Both the claimant(s) and respondent must therefore agree to permit the attendance of non-parties, including civil society groups. While state lawyers consented to the coalition’s request, AASA objected to the coalition’s entry and access to court documents, arguing that it would unfairly favour the state. However, neither the ICSID Convention nor ICSID arbitration rules touch on the issue of amicus submissions, leaving this element of the petition open to question. Section 44 of the ICSID Convention provides that ‘if any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.’ In their decision, the Tribunal allowed the coalition’s request, acknowledging that,

The acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function.²⁰

This marked the first time in ICSID history that a tribunal decided it had the power to accept amicus submissions. In their submission, the coalition drew attention to the human right to water

under international treaties, including the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Argentina's refusal to allow tariff increases was a necessary step, the petition argued, to meet its human rights obligations.²¹ By framing the dispute as a human rights issue, the coalition sought to leverage the conflict between investor rights under IIAs and human rights under public international law to alter the way in which arbitrators translated the BIT.

It is important to note that while state lawyers did not consult activists in the development of the state's defence, activist discourse regarding the government's human rights obligations was emulated by state lawyers throughout the ISDS proceedings and in other cases involving claims by water companies. This is likely because the human rights frame strengthened the state's argument that instituting the emergency measures was a necessary response to the crisis conditions and was therefore excusable according to the necessity defence. Observations regarding the company's failure to meet community needs, which were first articulated by consumer rights activists were also echoed by state lawyers during the proceedings. Such observations supported the state's assertions that the company violated its contractual commitments well before the contract was terminated. Activists therefore had an indirect, but significant influence over the state's defence strategy.

The tribunal, however, found that Argentina's refusal to revise the tariffs according to the concession contract and its 'forced' pursuit of contract renegotiations was in violation of the company's right to fair and equitable treatment.²² The tribunal rejected the coalition's argument that Argentina's human rights obligations to assure citizens the right to water trumped its BIT commitments. Rather, they asserted that Argentina's human rights obligations and its BIT obligations were not inconsistent, contradictory or mutually exclusive and that Argentina could

have respected both types of obligations.²³ No mention, however, was made to how Argentina may have allowed AASA to raise tariffs while maintaining impoverished communities' access to water. The *amicus curiae* petition therefore failed to prevail over arbitrator judgements. Instead, arbitrators responded to the state's necessity defence, concluding that,

Given the frequency of crises and the emergencies that nations, large and small, face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations.²⁴

The tribunal awarded the investors just over US\$ 405 million. Therefore, while the coalition opened an unprecedented opportunity for civil society participation in arbitral proceedings, participating via an *amicus curiae* submission meant that activists adjusted protest strategies to meet the parameters laid out by arbitrators and the disputing parties. This is contrast to the more widespread rejection of ICSID's authority following the Occidental dispute in Ecuador. While Kirchner placed a freeze on signing new BITs, the government did not terminate existing agreements nor withdraw from the ICSID Convention.

Civil society groups mobilised against the company and unresponsive regulators in the lead up to the 2001 economic crisis. During the crisis, the Duhalde administration acknowledged that drastic measures were needed to quell citizen unrest and ensure access to basic services for impoverished consumers. Civil society activism and demands for access to basic services therefore provided, in part, the impetus for the Duhalde government's introduction of the emergency measures challenged by AASA. In this way, civil society activism was an important driver of the dispute's emergence. The election of Néstor Kirchner expanded political

opportunities for activists, namely by enhancing their influence over contract renegotiations with the company. This reflected Kirchner's desire to renew state alliances with progressive factions of civil society, particularly human rights activists. As in Ecuador, activist pressure helped shape government positioning in the renegotiations and ultimately helped inform government decisions to renationalise the concession area. Although this ultimately led to a negative ruling against the state, it was in agreement with activists' ultimate goal of ending the company's monopoly over local water sources.²⁵ Therefore, while the dispute on the surface appeared to be a contractual matter, the dispute's emergence and the arbitral proceedings cannot be understood fully in the absence of its broader social and political context.

ISDS and Citizen-Driven Politics at the Margins

By defining the state and foreign investor as the sole 'parties' to the dispute, arbitration rules significantly narrow the formal ways in which civil society actors can participate. Yet that does not mean that ISDS proceedings are insulated from civil society intervention. As both case studies demonstrate, civil society actors have multiple means of intervening in the enforcement of investment rules. Both disputes have their origins in localised conflicts between the companies' operators and surrounding communities. Yet activists employed strategic frames to put the disputes on the national political agenda. In Ecuador, the negative impacts of Occidental operations on indigenous communities and the environment were framed as reflective of corporate greed and injustices undergirding neoliberal policy. This fed on growing anti-US sentiment and public skepticism of neoliberal reforms. In Argentina, community activists framed their opposition to AASA as a human rights issue, which drew attention to the conflict between

investor rights and the rights of citizens under public international law. Mass protests and community actions also proved invaluable for activists that otherwise had limited access to financial and technical resources with which to sway political decision making. Mounting political pressure, combined with each government's desire to establish cooperative alliances with progressive factions of civil society, blocked state officials from meeting their commitments under IIAs, leading to the disputes' emergence. Civil society groups maintained political pressures throughout the ISDS proceedings to ensure that political officials avoided settlements that would have kept the companies in the country. Indeed, both companies were renationalised following investors' exit. This suggests that civil society can have an important influence on government positioning throughout arbitral proceedings.

Yet, the points of entry pursued by activists differed in some ways. In Ecuador, civil society groups stayed at the margins of the dispute while targeting the normative foundation on which ISDS rests through anti-neoliberal discourse and by mobilising opposition against ICSID. This altered the relationship between Occidental and the Ecuadorian state, which had previously been cooperative, and helped lay the groundwork for Ecuador's withdrawal from ICSID and the termination of select BITs. Yet it is important to note that Ecuador's selective withdrawal from the global IIA assemblage was also motivated by Correa's desire to buttress his political appeal and recover state sovereignty lost to neoliberal restructuring. In Argentina, activists coupled community actions with efforts to open formal opportunities for participation. In doing so, activists carved out an unprecedented avenue for participation and helped reshape procedural rules. Arguments advanced by activists through the amicus submission failed to prevail over arbitrators judgements while participating in this way helped legitimate existent arbitral rules. The technical-legal expertise needed to participate through written testimony may prove to be a

significant barrier for civil society participation in the future, particularly in the developing world where activists have less access to technical resources. However, arbitrators do not engage with IIAs in the same way, as demonstrated by Bridgette Stern's dissenting opinion in the Occidental case. Therefore, the opening of new avenues for civil society participation in arbitral proceedings may signal greater opportunities for activist influence in the future.

The variation in activist approaches can be attributed to differences in ideology and perceptions of political opportunities. Indigenous and environmental activists in Ecuador saw ISDS, and ICSID in particular, as a mechanism through which corporate actors assert power over countries in an era of expanding corporate rights. Given the relative success of anti-neoliberal movements in staving off neoliberal reforms at the national level, activists believed there to be greater political opportunities at the national level to advance their agenda and objected in principle to participating in ISDS. Their efforts therefore focused on blocking state officials from meeting their commitments to Occidental under the US-Ecuador BIT. In Argentina, community activists contested the corporate bias they saw as inherent in the arbitral process which placed the property rights of foreign investors above the human rights of community members. Yet they were joined by more experienced and reform-oriented CSOs that sought to create more inclusive international decision-making structures. Opening up opportunities for civil society participation in ISDS and appealing to Argentina's human rights obligations under public international law, from their view, was an opportunity to correct for institutional corporate bias. These cases confirm Sikkink's expectations that activists will pursue their agendas at the domestic level when international institutions are perceived to be relatively more closed. Yet they also demonstrate that activists perceive opportunity structures differently and their perceptions of which are in part influenced by ideology. This suggests that opportunity structures are at least in part subjective.

Applying the metaphor of assemblage to ISDS turns analytical attention to the diverse actors and processes involved in the enforcement of investment rules. Understanding how these actors interact at the global and domestic levels is essential to understanding the uneven way in which investment rules are applied across time and space. It also opens up greater space to examine and theorise how domestic actors intervene to shape arbitral processes. The risk, however, is that we under-emphasise important structural forms of power in the global economy. Certainly the creation and functioning of the global IIA assemblage is not in the absence of asymmetrical power relations between countries, foreign investors and civil society groups. Yet, exploring the contested ways in which investment rules are translated into state obligations renders more visible the important role citizens play in shaping the political outcomes of international institutions and neoliberal globalization.

¹ This includes ISDS cases in which NGOs participated through public hearings and the submission of written testimony: *Methanex v. the United States*, *United Parcel Service of America v. Canada* and *Glamis Gold v. United States of America*.

² How civil society activism varies across disputes involving foreign investors active in different economic sectors and contexts is a question for further research.

³ Enforcement in this study refers to the process of holding a government accountable to investment rules through international arbitration. It is not meant to refer to the process of enforcing specific arbitral awards against governments where foreign investors win out in ISDS cases.

⁴ Several governments, including Canada and the United States, have also begun including provisions that require the public release of court documents in investment treaties.

⁵ For instance, international tribunals in *LGE v. Argentina* and *CMS v. Argentina* disagreed as to whether the 2001 economic crisis met the conditions of necessity, contributing to seemingly contradictory rulings on the state's liability.

⁶ For example, while negotiations towards a free trade agreement between Ecuador and the United States were brought to a halt following Ecuador's disputes with US-based oil companies, the United States government refused demands by oil companies to retract Ecuador's ATPA status as it would have risked the country's refusal to cooperate in the War on Drugs, a significant foreign policy priority (Ghaemmaghami 2003/4).

⁷ See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador*, Award, ICSID Case No. ARB/06/11, 5 October 2012, pp. 61 para 174-176.

⁸ See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador*, Award, ICSID Case No. ARB/06/11, 5 October 2012, pp 63, para 181.

⁹ See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador*, Award, ICSID Case No. ARB/06/11, 5 October 2012, pp 65, para 187.

¹⁰ See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador*, Award, ICSID Case No. ARB/06/11, 5 October 2012, pp 67, para 196.

¹¹ See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador*, Award, ICSID Case No. ARB/06/11, 5 October 2012, pp 67, para 197-199.

¹² See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador*, Award, ICSID Case No. ARB/06/11, 5 October 2012, pp 69-70, para 203 – 206.

¹³ See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador*, Dissenting Opinion, ICSID Case No. ARB/06/11, 20 September 2012.

¹⁴ Interview with National Assembly member, Quito, 8 October 2014.

¹⁵ See *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, pp. 15 – 17.

¹⁶ It is beyond the capabilities of this paper to provide a full comparison of the regimes. Several studies however provide excellent insight, see: Conaghan 2008; Levitsky and Murillo 2008; Cameron 2009; Grugel and Riggirozzi 2009; de la Torre 2014; Wylde 2011.

¹⁷ This included the Consumidores Libres Cooperativa Limitada De Provisión de Servicios de Acción Comunitaria (Free Consumers Cooperative of Service Provision and Community Action), the Unión de Usuarios y Consumidores (Users and Consumers Union), the Asociación Civil por la Igualdad y la Justicia (Civil Association for Equality and Justice), Centro de Estudios Legales y Sociales (Centre of Legal and Social Studies) and the Centre for International Environmental Law based in Washington.

¹⁸ Interview with former activist, Buenos Aires, 14 April 2014.

¹⁹ See *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina*, Petition for Transparency and Public Participation as Amicus Curiae, ICSID Case No. ARB/03/19, 28 January 2005, pp 3, para 4.

²⁰ See *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina*, Petition for Transparency and Public Participation as Amicus Curiae, ICSID Case No.

ARB/03/19, 28 January 2005, pp 9 para 20 – 22.

²¹ See *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina*, Amicus Curiae Brief, ICSID Case No. ARB/03/19, 4 April 2007.

²² See *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, pp. 94 para 242.

²³ See *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, pp.102 para 262.

²⁴ See *Suez, Sociedad General de Aguas de Barcelona S. A. and Vivendi Universal S. A. v. the Republic of Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, pp. 258. It is important to note that tribunals rejected the necessity defence in several cases while others agreed with the defence. According to Peterson (2012), arbitrators rejected Argentina's necessity defense with unanimous decisions in five cases (CMS, Sempra, Enron, BG and National Grid) and by a two to one majority in three cases (Suez, Impreglio and El Paso). Arbitrators accepted the defense to some extent in three cases (LG&E, Continental Casualty and Total).

²⁵ It is important to note that AASA requested its contract be terminated to enable it to exit the market in light of the rising costs of service provision. The Kirchner government refused the request on the basis that no other provider could be found to meet the community's needs in the meantime. The contract was abruptly cancelled by the Kirchner government in 2006.

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